IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1734 OF 2002

1. Mr.B.B.Paymaster,
   Age: 90 years, Occ: Retired (ICS) residing at No.1, Kamal Mahal, Carmichael Road, Mumbai 400 026.

2. Mr.Shivling G.Bhosale,
   age about 63 years, Occ.: Retired (IAS) residing at B-1 Chanakya Housing Society, 411, Shivaji Nagar, Pune 411 014.

3. Mr.Ramesh N.Rao,
   aged about 57 years, Occ.:C.A. residing at Nilkanth, Survey No.39, Mate Nagar, Wadaonsheri, Pune 400 014.

4. Mr.Jay Sangappa Kadapatti,
   Age: 41 years, Occ.: Social Worker, Business, residing at 6/A, Boat Club Road, Pune 411 001.

5. Mr.Rajiv Sangappa Kadapatti,
   Age: 36 years, Occ.: Business, residing at 6/A, Boat Club Road, Pune 411 001. .... Appellants.
   (Org.Applicants)

Versus.

1. Mrs.Baurawa Sangappa Kadapatti,
   Age: 60 years, Occ. Housewife.

2. Miss Renuka Sangappa Kadapatti,
   Age: 35 years,Occ.: research Student.

3. Mr.Sanjay Sangappa Kadapatti,
   Age: 30 years, Occ.: Service.

   All residing at 6/A, Boat Club Road, Pune 411 001. ... Respondents
   (Org.Non-Applicants)

Mrs.Anita Agarwal for the Appellants.

Shri V.B.Rajure for the Respondents Nos.1 to 3.

CORAM ; ABHAY S. OKA, J.

DATED : 16th August, 2004.

Hearing concluded on : 29th July 2004.

Date of Prouncement : 16th August 2004.

JUDGMENT.

1. On July 27th and 29th July 2004 this Appeal was heard finally. The order impugned in the Appeal is an order rejecting an Application for Probate filed by the Appellants. Considering the facts and circumstances of the case and in view of the case made out in the Civil Application No.1437 of 2002, this Appeal was taken up for final hearing out of turn.

2. The Appellants applied for grant of Probate in respect of the alleged last will dated 29th April 1998 of late Dr.(Miss) Indu Shankarrao Patwardhan. The will is a registered will. The Application under section 276 of the Indian Succession Act, 1925 (hereinafter referred to as "the said Act") was filed by the Appellants claiming to be the Executors appointed under the said Will. The Testator died on 8th February 1999. It is stated in the Application that the only real brother of Testator passed away 40 years ago and the said brother

is survived by his widow Mrs.Laila Parwardhan his son Shri Pranay Patwardhan and a daughter Mrs.Pravasini Sawhney. The Respondents who were impleaded as Opponents in the Application are the alleged beneficiaries under the Will along with the Appellant Nos.4 and 5. It appears from the Application that the deceased left behind large and valuable moveable and immoveable properties. The Respondents filed a pursis stating therein that they had no objection if the Probate was granted.

3. The learned trial Judge directed that a citation be published in a Newspaper which was published in Daily Prabhat. Citation was not issued to the legal representatives of the deceased brother of the Testator. The Appellants examined on oath the Appellant No.5, the alleged attesting witnesses and a Medical Practitioner.

4. The learned trial Judge by his Judgment and Order dated 29th July 2002 rejected the Application for Probate. The learned trial Judge rejected the Application on the ground that (i) the averments in the Application were vague, (ii) averments in the Applicant were not proved as required by Order VI Rule 2 of the Code of Civil Procedure, 1908, (iii) the Schedule of the

property annexed to the Application is not signed by the Advocate for the Appellants, (iv) the description of the property mentioned in the Will and the description of the property mentioned in the Schedule was not identical, (v) it was not proved that the Testator was the owner of the property mentioned in the Will, (vi) relatives of the deceased Testator who were named in the Application were not impleaded as parties, (vii) the Death Certificate of parents of the of the deceased Testator were not filed on record and (vii) the contents of the Will were not proved.

5. The submission of the learned Counsel Mrs Agarwal for the Appellant is that the execution of the Will was duly proved after a citation was published in a Newspaper. No one had filed a caveat in the proceedings and the Court did not receive any objection on the basis of publication of the citation. She submitted that the Application was supported by the Respondents and therefore, the same should have been allowed. She pointed out that a Probate Court cannot decide the issue of title. It was not necessary to prove that the deceased was the owner of the properties mentioned in the Will. The learned Counsel for the Respondent supported the Appellant.

6. I have considered the rival submissions. The trial Court has found fault with the Appellants on the ground that the title or ownership of the deceased in respect of the property subject matter of the Will is not established. The Apex Court in a Judgment reported in (1993) 2 S.C.C. page 507 (Chiranjilal Shrilal Goenka since deceased through LRs. v/s. Jasjit Singh and others) held that the grant of Probate with will annexed establishes conclusively as to the appointment of executor and the valid execution of the Will. The Probate Court does not decide any question of title or of existence of the property itself. This Court in a Judgment reported in 2003(1) Mah.L.J. page 113 (Baban Rambhau v/s. Heman Rambhau) held that it is well settled that it is not the duty of the Probate Court to consider any issue as to the title of the Testator to the property with which the will propounded purports to deal. In view of this position, the Application for Probate made by the Appellants could not have been rejected on the ground that the Appellants did not prove that the Testator was the owner of the properties affected by the will.

7. The learned trial Judge has not at all considered the evidence of the attesting witnesses and the Doctor

examined by the Appellants. The Court was concerned only with the question as to whether the document put forward as the last Will of the Testator was duly executed and attested as required by law and whether at the time of execution of the Will the Testator was in sound disposing mind. Therefore, the learned Judge committed an error by not considering and deciding the said question. The fact that the Advocate for the Appellant has not signed the Schedule to the Application for Probate is a mere technicality and the trial Court could have called upon the concerned Advocate to comply with formality instead of rejecting the Application on the said ground.

8. The trial Court has rejected the Application on the ground of non joinder of necessary parties. It is, therefore, necessary to refer to the provisions of the said Act. Section 283 of the said Act reads thus:

> 283. Powers of the District Judge. . (1) In all cases the District Judge or District Delegate may, if he things proper, -
>
> (a) examine the petitioner in person, upon oath;

(b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

. (2) The citation shall be fixed up in some conspicuous part of the court-house, and also the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

. (3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it

were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

The section vests a discretion in the Judge in the matter of issuing citations. The said discretion is required to be exercised with utmost care considering the fact that the finding of the Probate Court as regards execution of the Will operates in rem. In a case where Probate of a will is asked for, a special citation ought to be served upon those persons whose interests are directly affected by the Will. The practice of issuing only a general citation and ordering publication thereof in a newspaper or ordering affixing the citation in conspicuous part of Court house may tend to encourage fraud. Though the section does not make it obligatory to serve a special citation, it is desirable to serve special citation on the persons who would have been entitled to inherit the property of the deceased as per the law of intestate succession and who have been excluded from succession by the will. Whenever it is disclosed in the Probate petition itself that there are persons claiming to have any interest in the estate of the deceased, the Court will have to exercise discretion under section 283 by directing service of citation on such persons.

9. In the present case the Testator was unmarried. As disclosed in the Probate Application, her real brother's widow, son and daughter are alive. The Appellant No.5 has stated in his deposition that except the said three relatives, no other close relative of the Testator is alive. In absence of any testamentary disposition by the deceased Testator, her property would have devolved on the heirs of her father in view of section 15(1)(d) of the Hindu Succession Act, 1956. The widow, the son and the daughter of testator's brother are Class I heirs specified in the Schedule under the said Act of 1956. The learned Counsel Mrs.Agarwal submitted that after publication of public notice, the said persons have not come forward for raising any objection. She stated that the Respondents have given their no objection for grant of Probate and therefore, Probate ought to have been granted. A Court of Probate is said to be a Court of conscience which should not to be influenced by private arrangement of parties. A Court of Probate has to act cautiously and with utmost care. When the learned trial Judge has taken a note of the fact that the said close relatives of the deceased were alive who may be interested in the estate of the deceased as they were her heirs as per the said Act of 1956, he ought to have issued citations to the said persons named in the Probate Application.

10. The learned Judge has found fault with the Appellant for not producing death certificate of the parents of the Testator. The Applicant No.5 has stated on oath that the deceased had no close relative alive except her sister-in-law and the sister-in-law's son and daughter. Therefore, no fault can be found with the Appellants if they did not produce the death certificates of the parents of the Testator.

11. In the circumstances, the impugned order will have to be set aside and the Application for Probate will have to be remanded to the trial Court. As the trial Court has made observation regarding discrepancy in the description of the property in the will and the schedule to the Application, liberty will have to be given to the Appellants to amend the Schedule to the Application if it is deemed necessary. The trial Court will have to decide the matter afresh in the light of the discussion made above after issuing citations as directed by this Judgment and order.

12. Hence I pass the following order:

(i) The Appeal is partly allowed with no order as to costs.

(ii) The impugned Judgment and Order is quashed and set aside.

(iii) Misc.Application No.393 of 2001 is remanded to the Court of the learned Second Joint Civil Judge, Senior Division, Pune. The Parties to this Appeal are directed to appear before the learned Trial Judge on 6th September 2004 at 11.00 a.m.

(iv) The learned trial Judge will direct that the citation shall be served on the persons named in paragraph 5 of the Misc. Civil Application for Probate.

(v) The learned trial Judge will give opportunity to the Appellant to amend the Application for probate and the Schedule annexed thereto.

(vi) The learned trial Judge will allow the parties to lead further evidence.

(vii) After considering the evidence which is already on record and further evidence which

may be led by the parties, the learned trial Judge will decide the application afresh in the light of the observations made in this Judgment.

(viii) The learned trial Judge will decide the application as expeditiously as possible and in any event on or before 30th June 2005.

Judge.